

NONDISCRIMINATION OR DEREGULATION: A U.S.-E.U. COMPARISON

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Let me share some thoughts from the perspective of legal structure about the general question that is on the table: is the United States regulatory regime undermining our competitiveness? Others on the panel, far more expert than me, will focus on the specific nature and burdens of laws such as Sarbanes-Oxley¹ and the aggressive litigation that occurs thereunder. One can reasonably speculate, as the brilliant Professor Epstein² and the very practically knowledgeable George Terwilliger³ illustrate, that indeed there are some adverse consequences for competitiveness from Sarbanes. I want to flip the question, however, and focus not on the negative impacts of U.S. policy but the positive side of European Union policy.

The European Union is premised upon a number of freedoms: the freedom of movement of goods, persons, capital, and services. The Union, of course, consists of 27 countries, 13 of which have a common currency, the Euro. It accounts for 22% of the world's Gross Domestic Product.⁴ It is, indeed, the

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended at 15 U.S.C.).

2. Richard A. Epstein, *The Dangers of "Investor Protection" in Securities Markets*, 12 TEX. REV. L. & POL. 411 (2008).

3. George J. Terwilliger III, *Impediments to Commercial Risk-Taking*, 12 TEX. REV. L. & POL. 435 (2008).

4. See Central Intelligence Agency, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited May 20, 2008) (listing the European Union's Gross Domestic Product at \$14.44 trillion and the world's Gross Domestic Product at \$65.82 trillion).

largest exporter of any economic entity, and 163 of the 500 largest global companies are located in the European Union.⁵

A good long time ago, Adam Smith told us in 1784 about the economic advantage of international trade.⁶ He arrived at this principle out on an analogy of the family.⁷ He proposed that it was imprudent for a family to make that which it could buy more cheaply from others.⁸ And from this rather basic principle, it was derived that a nation that could buy goods more cheaply from others should not engage in manufacturing of that same product.⁹ Consequently, Smith's theory has been with us a long time. The theory, however, is now open to some challenge in a globalized world, where firms are finding it easier to engage in multinational production or manufacturing, looking too for component efficiency and taking advantage of the efficiencies that exist across a number of nations.

With businesses increasingly looking for multinational or transnational efficiencies, what does that mean for a European Union to United States comparison? At a minimum since the U.S. is not more than one nation, the European Union, by virtue of its own organizational structure, might be said to be better positioned to take advantage of these multinational competitive efficiencies.

However, to match reality, we must complicate our theoretical comparison. Both the United States and the European Union have both legislative and judicial means by which they promote not regulatory competition but market integration and harmonization. The United States¹⁰ and European Union,¹¹ for example, both have antitrust laws that have this as at least a

5. See CNN Money.com, Fortune 500, <http://money.cnn.com/magazines/fortune/global500/2007/countries/US.html> (last visited May 20, 2008) (listing the number of Global 500 companies by country).

6. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Random House 1937) (1776).

7. *Id.* at 423–24 (“It is maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy . . . What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage.”).

8. *Id.*

9. *Id.*

10. See, e.g., Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

11. Emmanuel P. Mastromandis, *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law*, 15 U. PA. J. INT'L BUS. L. 559, 562–638 n.6–7 (1995).

partial objective. But there are also separate bodies of jurisprudence in the United States and the European Union that promote market integration. In United States, we know this as the jurisprudence of the Dormant Commerce Clause.

The Dormant Commerce Clause jurisprudence, as is well known to my law students, precludes overt and, to some degree, implicit discrimination against interstate commerce. It largely does this, however, by the adoption of a nondiscrimination principle, a principle that basically precludes a given state from favoring itself.¹² But notice that the principle does not in any way guarantee deregulation. It does not promote the free market, so much as it promotes the standardization of the market. It merely allows the court to intervene to promote nondiscrimination. By contrast, the European Union indulges a principle of mutual recognition that in theory and effect is often aimed at the minimization of unjustified quantitative regulatory limits on market transactions. Let me give you an example.

There is a seminal French case, a case that may be well familiar, but since it has engaging facts, it bears repeating.¹³ France had a wine with a 20% alcohol content and wanted to export that wine to Germany.¹⁴ The Germans apparently take offense at a wine with only 20% alcohol content. In Germany, there is a minimum alcohol content of of 25%.¹⁵ Germany sought to erect a regulatory barrier to the French product.

What were the regulatory arguments against the French wine? Rather counter-intuitively, the French argued that diluted alcohol products promote alcoholism.¹⁶ The theory of the German Republic was that if you invite people to drink this diluted liquor, they will just drink more and more of it and ultimately become addicted.¹⁷ The European Court of Justice looked at that putative health justification and was unpersuaded.¹⁸ The other justification that Germany held out was unfair competition—the argument being that insofar as the

12. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1800–01 (2007).

13. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

alcohol element of the wine is the most expensive, if you allow French wine with a smaller amount of alcohol to be sold, the Germans will be snookered, or as they might say, *gesnookert*.

At this point, the litigation got nasty, with allegations that even the Germans diluted their beer. Putting these matters of national pride aside, it is obvious that any problem of unfair competition could be readily handled by straightforward labeling requirements.¹⁹ The European Court of Justice determined that, insofar as the French wine product was lawfully used and marketed in France, the principle of mutual recognition called for the French regulatory regime that was less burdensome and less costly to be governing in the German Republic.²⁰ Notice the profound difference, therefore, between our Dormant Commerce Clause jurisprudence, which is merely a nondiscrimination principle, and the more deregulatory principle of the European Union.

One additional aspect of our Dormant Commerce Clause jurisprudence also bears mentioning at this point, and that is that it has taken a turn for the worse—at least from the standpoint of deregulation. In the last term of the Supreme Court, there was a case called *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, a case that dealt with trash, a subject with which most Dormant Commerce Clause cases in United States deal.²¹ In an opinion by Chief Justice Roberts, the Court resolved that regulatory monopolies would now be exempt from the Dormant Commerce Clause jurisprudence.²² This came as quite a surprise. The Chief Justice said, “States and municipalities are not private businesses—far from it.”²³ We will give him that one. The Chief Justice elaborated: “[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism. The Commerce Clause does not elevate free trade above all other values.”²⁴ That is an intriguing comment for the Chief Justice to articulate, and presumably, environmental and other proregulatory considerations are what he has in mind.

19. *Id.*

20. *Id.*

21. 127 S. Ct. 1786 (2007).

22. *Id.* at 1790.

23. *Id.* at 1795.

24. *Id.* at 1795–96.

Concern for the environment is not absent from the European Union regime, but to this American reviewer they appear more tentatively in European Court of Justice determination.²⁵

Justice Alito, in dissent, had a different view of the matter. He said, “We have never treated discriminatory legislation with greater deference simply because the entity favored by that legislation was a government-owned enterprise.”²⁶ Let me finish this brief U.S.-E.U. comparison with a little more of Justice Alito’s thinking because it reveals not only an unusual divide with the Chief Justice, but also the difference between the deregulatory E.U. perspective and the extent to which the United States has chosen only nondiscrimination, and perhaps, with respect to the favoritism of local government, even less. Justice Alito wrote:

I see no basis for the Court’s assumption that discrimination in favor of an in-state facility owned by government is likely to serve legitimate [local] goals ‘unrelated to protectionism.’

. . . Experience in other countries, where state ownership is more common than it is in this country, teaches that governments often discriminate in favor of state-owned businesses (by shielding them from international competition) precisely for the purpose of protecting those who derive economic benefits from those businesses, including their employees. Such discrimination amounts to economic protectionism in any realistic sense of the term.²⁷

To summarize, the European Union is a multinational entity that, to some degree, can take advantage of the regulatory competition that multinational entities present in a Tiebout sense.²⁸ This is especially true to the extent that manufacturers can realize efficiencies related to the fabrication of product components in geographic locations different from the point of

25. European Commission, Environment and Internal Market, http://ec.europa.eu/environment/integration/internal_market_en.htm (last visited May 20, 2008) (“The increasing openness of the market is sometimes perceived as a threat to the quality of Europe’s environment. By the same token, environmental standards are often seen as barriers to market access. Finding a way to integrate these two policy areas is the main challenge facing Europe’s policy-makers.”).

26. *United Haulers Ass’n*, 127 S. Ct. at 1805 (Alito, J., dissenting).

27. *Id.* at 1807–08.

28. Charles M. Tiebout, *A Pure Theory of Local Government Expenditures*, 64 J. POL. ECON. 416 (1956); Douglas W. Kmiec & Eric L. Diamond, *New Federalism Is Not Enough: The Privatization of Nonpublic Goods*, 7 HARV. J. L. & PUB. POL’Y 321 (1984).

ultimate assembly and export. To the extent that the European Union seeks to harmonize itself and prefers market integration over regulatory competition, its method of harmonization, as exemplified by the *Cassis* case, is oriented toward one that is deregulatory and minimizing of quantitative restriction in favor of the free movement of goods. By comparison, the United States is a single market, thereby losing the advantage of Tiebout-regulatory competition, and is not jurisprudentially committed to a judicial method of harmonization that promotes deregulation as opposed to nondiscrimination. A principle of nondiscrimination may ensure regulatory evenhandedness; it does not ensure deregulation. Moreover, recent legal development suggests that nondiscrimination in the United States applies with even less force to costly regulatory barriers erected by local governments.